No. 79-883

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERTRAM ZWEIBON, ET AL., PETITIONERS

v.

JOHN N. MITCHELL

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

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1. The facts of this case and a description of the decisions below are set forth in the Statement to our petition in No. 79-881. We note the following with respect to the additional issues raised in the cross-petition.

a. This case has been before the court of appeals on more than one occasion. In its first decision, the court of appeals reversed an award of summary judgment for the respondent, holding that the Fourth Amendment requires prior judicial authorization for national security electronic surveillance unless the target of the surveillance is an agent of, or a collaborator with, a foreign power. 516 F. 2d 594, 614 (1975) ("*Zweibon I*") (plurality opinion); *id.* at 689 (Wilkey, J., concurring in part). A plurality of the court also held that "the procedures and remedies of [Title III of the Omnibus Crime Control and

Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*] completely occupy the wiretapping field except to the extent the President's powers were rendered constitutionally immune from the warrant procedure of the Fourth Amendment" (516 F. 2d at 666; emphasis deleted) and that the remedies of Title III are therefore applicable to unconstitutional national security surveillances. (*id.* at 671).[1] Under the plurality opinion, the provisions of Title III that provide for liquidated damages "at the rate of $100 a day for each day of violation," punitive damages, and attorney's fees (18 U.S.C. 2520) apply to any national security surveillance conducted in violation of a constitutionally-imposed warrant requirement.

b. On remand, the district court concluded that the decision of the court of appeals in *Zweibon I* should not be applied retroactively to the facts of this case. The court therefore granted respondent's renewed motion for summary judgment (79-881 Pet. 7-8; see 79-881 Pet. App. 35a-36a & n.5).

Although the court of appeals reversed other aspects of the district court's ruling (see 79-881 Pet. 8-9), the court of appeals agreed that its holding in *Zweibon I* that Title III applies to warrantless national security surveillances "represented the sort of sharp break in the law which should be restricted to prospective effect" (79-881 Pet. App. 20a). The court held, however, that Title III liability might nonetheless be established in this case if, on remand, petitioners can show that the surveillance was not primarily motivated by national security purposes but was instead motivated by the desire to obtain evidence for prosecutorial purposes (*id.* at 9a). See 79-881 Pet. 9 & n.6.

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[1] Judge Wright, writing for the plurality, concluded that "Congress intended that applicability of Title III procedures and remedies in the national security context be contingent upon further judicial pronouncements concerning the constitutional question reserved in *Katz*." 516 F. 2d at 671. In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court expressly declined to rule on whether prior judicial authorization is required for national security electronic surveillances. In *United States* v. *United States District Court*, 407 U.S. 297 (1972), the Court concluded that a warrant requirement is applicable to national security surveillances involving purely domestic activity, but did not determine whether warrants are required for surveillance of foreign intelligence activities or domestic agents of or collaborators with foreign intelligence activities. *Id.* at 309 n.8.

2. Under the decision of the court of appeals, the damages provisions of Title III would apply to any warrantless national security surveillance not involving foreign agents or collaborators conducted after June 23, 1975, the date of the court's opinion in *Zweibon I*.[2] Such surveillances conducted prior to 1975, however, would not be subject to the remedies set forth in Title III. For reasons other than those advanced in the cross-petition, we agree that the question whether Title III is applicable to the events underlying this litigation merits the consideration of this Court.

a. The court of appeals correctly recognized that its holding in *Zweibon I*—that Title III applies to warrantless national security surveillances—constituted "the sort of sharp break in the law which should be restricted to prospective effect" (79-881 Pet. App. 20a). In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107

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[2] Title III was amended by the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797, which establishes specific procedures for conducting electronic surveillance for national security purposes. A surveillance conducted under the new Act has prompted a damage action against former Attorney General Bell that is now pending before the court of appeals. *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir.), on appeal from 468 F. Supp. 927 (D. D.C. 1979).

(1971), this Court held that retroactive application of substantive rules announced in judicial decisions is inappropriate (1) if the decision established a new rule of law by deciding an issue of first impression in a way not "clearly foreshadowed" by earlier decisions, (2) if retroactive application of the rule would not further its purpose or (3) if retroactive application would impose hardship or produce inequitable results. The court of appeals properly concluded that the factors identified in *Chevron Oil* counsel against retroactive application of the Title III ruling in *Zweibon I* to the facts of this case.[3]

b. Although the court of appeals correctly declined to apply its construction of Title III retroactively, we believe that the construction of Title III that the court adopted in *Zweibon I* is fundamentally in error. In *United States* v. *United States District Court*, 407 U.S. 297 (1972), this Court concluded, after an exhaustive review of the legislative history of Title III, that that legislation "does not attempt to define or delineate the powers of the President to meet domestic threats to the national security." *Id.* at 322. The Court held that, in enacting Title III, Congress "simply did not legislate with respect to national security surveillances." *Id.* at 306.

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[3] Petitioners claim that the Title III ruling in *Zweibon I* should be applied retroactively in this case because the new rule was adopted in the course of this litigation. But the decisions on which petitioners rely (Pet. 5) all involve cases in which criminal defendants successfully sought to establish new rules in the course of their defense to criminal charges. Retroactive application of newly developed rules in that context differs markedly from the situation here, where retroactive creation of personal damages liability in individual civil actions would be inconsistent with due process principles. See *Morales* v. *Hamilton*, 391 F. Supp. 85, 88-89 (D. Ariz. 1975); *Hiss* v. *Hampton*, 338 F. Supp. 1141, 1148-1149 (D. D.C. 1972) (three-judge court).

As the dissenting judges noted in *Zweibon I*, the court of appeals' holding that Title III creates a damages remedy for warrantless national security surveillances is directly at odds with this Court's conclusions in *United States* v. *United States District Court*. See 516 F. 2d at 693-699 (Wilkey, J., dissenting); *id.* at 706-707 (MacKinnon, J., dissenting).[4] Accordingly, in the event that the Court grants review, we will contend, as an alternative ground to support the court of appeals' judgment that Title III remedies may not be applied to the warrantless national security surveillance challenged in this case, that Title III is wholly inapplicable to such surveillances. The need to correct the court of appeals' misinterpretation of Title III has become pronounced due to the conflicting judgments that have resulted in the lower courts, some of which have followed and some rejected the *Zweibon I* decision.[5]

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[4] The legislative history supports the construction of Title III adopted by this Court in *United States* v. *United States District Court*. The Senate Report recognized that there would be occasions where "foreign affairs and internal security" concerns might "overlap" with "domestic criminal" concerns and noted that where such overlapping occurred the surveillance would fall "outside the scope of [Title III]." S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968). The Court acknowledged this fact in commenting that Congress might properly consider different standards for national security surveillances than "those already prescribed for specified crimes in Title III." *United States* v. *United States District Court*, *supra*, 407 U.S. at 322. The Court noted that "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency." *Ibid.*

[5] For example, two district judges in the same federal district court have reached different results under Title III in two cases involving the identical national security surveillance. ***Burkhart*** v. ***Saxbe***, 448 F. Supp. 588, 605-607 (E.D. Pa. 1978) (following *United States* v. *United States District Court*, *supra*); *Forsyth* v. *Kleindienst*, 447 F. Supp. 192, 199-200 (E.D. Pa. 1978) (following *Zweibon I*). Subsequent proceedings in those cases have not resolved the

CONCLUSION

The petition (No. 79-881) and the cross-petition for a writ of certiorari (No. 79-883) should be granted.

Respectfully submitted.

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statutory issue (see *Forsyth* v. *Kleindienst*, 599 F. 2d 1203 (3d Cir. 1979)), and we have filed a petition for a writ of certiorari in those cases (No. 79-1120) only on the immunity issues decided by the court of appeals.

In *United States* v. *Smith*, 321 F. Supp. 424, 425 (C.D. Cal. 1971), the district court held that Title III is inapplicable to national security surveillances. In *Weinberg* v. *Mitchell*, 588 F. 2d 275 (9th Cir. 1978), the Ninth Circuit disagreed with any implication in *Zweibon I* that the remedies of Title III would apply to warrantless national security surveillances—such as those involved here—conducted prior to the 1972 decision in *United States* v. *United States District Court*. The court in *Weinberg* did not reach the question whether Title III would apply to warrantless national security surveillances conducted after 1972. 588 F. 2d at 276 n.2.

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